

# Setback for the descendants of the Nama and Ovaherero indigenous peoples

## A New York Court declines jurisdiction in Rukoro et al. v. Germany

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Almost two years after members and descendants of the Nama and Ovaherero indigenous peoples filed a [class action complaint](#) against the Federal Republic of Germany in a United States District Court, the New York Court dealing with the case [dismissed the complaint](#) on March 6, 2019 for lack of subject matter jurisdiction. The plaintiffs have filed a [notice of appeal](#) to the Second Circuit U.S. Court of Appeals on March 11, 2019.

This contribution will give an overview of the proceedings in New York and take a closer look at the Court's reasoning in rejecting the lawsuit. The historical background of the complaint as well as the parties' arguments in favor of their motions have already been discussed [here](#), [here](#) and [here](#).

### The proceedings in New York

The proceedings in New York were initiated by a class action complaint filed by Vekuii Rukoro as class representative on January 5, 2017. The plaintiffs, representatives of the Nama and Ovaherero indigenous peoples, [seek damages](#) for the genocide, damages for conversion of various property rights, damages for unjust enrichment, an accounting, the establishment of a constructive trust, and declaratory relief recognizing that they are legitimate successors to sovereign nations and declaring that their exclusion from negotiations between Germany and Namibia constitutes a violation of their rights under international law, including the [United Nations Declaration on the Rights of Indigenous Peoples](#). The plaintiffs also seek injunctive relief prohibiting Germany from continuing to exclude them from its negotiations with Namibia.

During the [course of the proceedings](#), the plaintiffs amended the complaint to include more factual material in support of the Court's subject matter and personal jurisdiction and Germany filed a motion to dismiss the amended complaint for lack of jurisdiction, for failure to exhaust remedies in Germany and under the doctrines of political question and *forum non conveniens*. Oral argument was held on July 31, 2018 and the Court took the matter under advisement. Following the oral argument, the plaintiffs filed a motion for leave to file a supplemental declaration or a second amended complaint.

On March 6, 2019, the New York Court [granted Germany's motion to dismiss](#) the amended complaint and denied the plaintiffs' motion for leave to file a supplemental declaration or a second amended complaint.

### **Germany's sovereign immunity**

According to [§ 1604 of the Foreign Sovereign Immunities Act \(FSIA\)](#), foreign states are presumptively immune from the jurisdiction of U.S. Courts, unless an FSIA exception applies. This reflects the [customary international law principle of sovereign immunity](#) of a state before the court of another sovereign state. The initial absolute approach to sovereign immunity has been exchanged for a [restrictive approach](#) which differentiates between *acta iure imperii* and *acta iure gestionis*. States enjoy immunity before the courts of another state only in regard to the former. Therefore, the New York Court (p. 18 of the judgment) has to interpret the exceptions to § 1604 FSIA narrowly so as not to expand their scope beyond the boundaries of the restrictive theory of sovereign immunity in international law. The [plaintiffs rely on](#) the commercial activity exception in [§ 1605 \(a\)\(2\) FSIA](#) and the takings exception in [§ 1605 \(a\)\(3\) FSIA](#).

The commercial activity exception requires that the lawsuit is based upon an act outside the U.S. in connection with a commercial activity of the foreign state, which causes a direct effect in the U.S. The plaintiffs have claimed that the collecting, sale and display of Ovaherero and Nama bones and the construction of railways in German South West Africa constitute such commercial activities by Germany. According to the Court (p. 9 of the judgment), however, the lawsuit is not based sufficiently upon these activities and a direct effect in the U.S. does not exist. The plaintiffs' claims are not centered upon Germany's commercial activities, but rather upon the taking of land, livestock and personal property in connection with the genocide. Moreover, despite the plaintiffs' pleading, it does not constitute a sufficiently direct effect that some of the members of the class reside in the U.S., that certain human remains and artefacts are present in U.S. institutions and that New York has become a research center for the study of the genocide.

The takings exception requires that property has been taken in violation of international law and that that property or any property exchanged for such property is present in the U.S. in connection with a commercial activity in the U.S. by the foreign state or owned by the foreign state's agencies which are engaged in commercial activities in the U.S. According to the Court (p. 14 of the judgment), the plaintiffs are successful in establishing that property has been taken in violation of international law and that property exchanged for that property is present in New York, but they are not able to show that the expropriated property is present in connection with a commercial activity carried on by Germany. The German properties in New York are principally used as a private residence for Germany's diplomats or to house Germany's mission to the U.N., its consulate, or German cultural institutions, such as the German Academic Exchange Service, the Goethe Institute and the German Academy of Art. The Court considers these to be sovereign and diplomatic, rather than commercial undertakings by Germany.

### **The Court's ruling**

Therefore, the Court concludes that due to Germany's sovereign immunity it lacks subject matter jurisdiction. In light of this conclusion, she declines to address the applicability of the [Alien Torts Statute](#), the exhaustion of remedies in Germany, the political question doctrine or *forum non conveniens*.

Moreover, the Court denies the plaintiffs' motion for leave to file a supplemental declaration or a second amended complaint because the additional facts the plaintiffs were planning to include could already have been brought forward as part of the initial or the amended complaint. Furthermore, the inclusion of more factual material would not lead to a different conclusion by the Court.

### **The way forward**

In the beginning of the judgment's discussion part, Judge Laura Taylor Swain deciding for the Court [cites](#) the following phrase: "*strong moral claims are not easily converted into successful legal causes of action*". It illustrates the difficulty of her position to reject claims derived from atrocities the international community is uniquely united in condemning. Hope remains, however, that, were such atrocities happening today, these would constitute legal claims, rather than merely moral claims. Numerous human rights treaties, which establish complaint procedures for individuals, are in force today, universal as well as regional instruments, which did not exist in the beginning of the 20<sup>th</sup> century. This does not, of course, come as a consolation to the representatives of the Nama and Ovaherero peoples in this case, who are determined to see the case to the end. The notice of appeal is lodged with the U.S. Court of Appeals. It is, however, unlikely that the avenue they have chosen will grant them the outcome they desire.

In light of a [European Parliament resolution](#) adopted on March 26, 2019 concerning fundamental rights of people of African descent in Europe, which encourages Member States to take steps toward meaningful and effective redress for past and ongoing injustices and crimes against humanity committed under European colonialism, the German government might at least consider to open the reconciliation negotiations with Namibia to include the descendants of those suffering the most from the atrocities committed by the German colonial authorities, the Nama and Ovaherero peoples.

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